

1. **Arafat (Migration) [2017] AATA 1370 (9 August 2017)**

2.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Md Yeasir Arafat
Ms Samaira Yeasir

CASE NUMBER: 1619089

DIBP REFERENCE(S): BCC2010/245152 bcc2017/19737

MEMBER: Catherine Carney-Orsborn

DATE: 9 August 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Skilled (Residence) (Class VB) visas.

Statement made on 09 August 2017 at 4:52pm

CATCHWORDS

Migration – Skilled (Residence) (Class VB) visa – Subclass 886 – Bogus document/misleading information – Trades Recognition Australian assessment – Issue with hours of work submitted – Credibility issues – No compelling circumstances

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 2, cl 886.225, cl 4020, Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 November 2016 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s.65 of the *Migration Act 1958* (the Act).
4. The applicants applied for the visas on 18 June 2010. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.886.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the first named applicant (the applicant) did not satisfy Public Interest Criterion (PIC) 4020.
5. The applicants appeared before the Tribunal on 2 August 2017 to give evidence and present arguments.
6. The applicants were represented in relation to the review by their registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.886.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
9. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

10. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The applicant applied for a skilled 886 visa on 18 June 2010. To support his application he supplied a Trades Recognition Australian assessment for the nominated occupation of Cook. The applicant supplied documents to TRA to support his claim of 900 hours' work experience from Moti Mahal Restaurant.
14. Attached to the application for review of the Department's decision lodged with the Tribunal was a copy of the Department's decision. In that decision record the delegate set out in detail the Departments' efforts to confirm as correct the information supplied by the applicant to obtain his skills assessment.
15. The Department had, as set out in the Department's decision, conducted checks and a site visit to ascertain that the information the applicant provided was correct. The Department spoke to a person at the Moti Mahal restaurant on a site visit on the 23 March 2011. That person claimed to be the owner of the restaurant and did not know the applicant.
16. On the 24 March 2011 the Department interviewed the previous owner Mr Rashid Mondal who attended the department's office. At that interview Mr Mondal said he sold the business in February 2010 and had full involvement as the restaurant manager up to that time. He kept no records for his volunteer workers. When shown photos of a number of visa applicants, including the applicant, he was able to recognise some applicants and verified a number of work references. However, he was not able to recognise the applicant.
17. On 11 August 2015 the Department sent an invitation to comment on adverse information.
18. On 7 September 2015 the applicant's representative responded. They pointed out a typographical error in the invitation. They further provided a copy of a work experience letter dated 5 September 2015 and signed by Mr Mondal. In that letter Mr Mondal claimed the applicant was employed at his restaurant from October 2008 to November 2009. He completed 920 hours of voluntary work experience. Mr Mondal stated that he operated the business at 195 Rocky Point Road Ramsgate from 2001 to September 2014 after which he relocated his business to 237 Rocky Point Road Ramsgate. He claimed that on 24 March 2011 no one from the restaurant, including Mr Mondal and his Head Chef, M.A. Hossain

received phone calls or visits from the immigration department regarding the applicant's work experience.

19. On 11 August 2016 a new invitation to comment on adverse information was sent to the applicant's representative. In response to that invitation the applicant's representative provided a statutory declaration from Mr Mondal, a statutory declaration from the applicant, submissions and a copy of a judgement from the Federal Court. Mr Mondal's statutory declaration was dated 6 September 2016. Mr Mondal stated that he was still the owner of the Moti Mahal Indian Restaurant. He stated he operated the business from 2001 to September 2014 and after that he relocated his business from 195 Rocky Point Road Ramsgate to 237 Rocky Point Road Ramsgate. He stated he was the only legal owner of the restaurant and is still the owner. He stated no one else has the authority to speak in relation to the management and staff of the restaurant.
20. He stated that the applicant did work for him. He said he is very busy and he cannot recall exactly what happened. He then claims he remembers he signed behind the photo of the applicant. He confirms he went to the Department on 24 March 2011.
21. At hearing the applicant gave the following evidence. He stated he is currently working as a fork-lift driver. He came to Australia in 2008 on a student visa. He studied a diploma of Hospitality Management. He needed to get work experience. He claims he was introduced to Mr Mondal who said he could help him. He claims he did volunteer work with the Head Chef and the head chef kept records. He claims there were 3-4 people in the kitchen. He states there were other volunteers however they came and went. He claims that Mr Mondal was very busy as he had 4 or 5 other restaurants. He states that Mr Mondal would visit the restaurant all the time.
22. He claims he worked as a volunteer for one year. He started another course in business management and has been on a bridging visa since 2010.
23. He claims that he has done some work as an assistant chef however he gave up. He was not able to say when he gave that work up. He stated it could be 2011, 2012 or 2013. He stated he was not sure of the spelling or names of all the restaurants he worked at.
24. The Tribunal said that in the response to the hearing invitation form he had indicated in his response that Mr Mondal would be a witness. The representative responded with words to the effect that Mr Mondal supplied legal documents from his solicitors which indicated that he was the owner of the restaurant and therefore did not attend the hearing.
25. The Tribunal asked the applicant if Mr Mondal had managers and supervisors at the restaurants. The applicant named two persons. The Tribunal asked if they would have known the applicant he responded they would have known him. The Tribunal asked if he had contact with the supervisors. He responded that he did not.
26. The applicant provided bank statements and photographs of his wife and child at the hearing. He indicated that the bank statements showed he was working and supporting his wife. The Tribunal responded that there did not appear many deposits. He stated that he was living off the deposits made. His submission is that his wife is studying and he is the sole financial support. She would not be able to continue to study in Australia if his visa was not continued. The Tribunal accepts this would impact upon his wife.
27. The Tribunal asked if there was anything else he wanted to add. He indicated there was not.
28. The applicant provided at the hearing, bank statements, photographs and a copy of TRA assessment which was dated 19 April 2010.

29. The applicant provided to the Tribunal documents from Mr Mondal solicitors which show that in November 2005 he purchased the Moti Mahal Indian restaurant from those documents it appears the business was purchased for just over \$50,000. There was also a transfer of lease.
30. The documents provided to the Tribunal indicate that in January 2010 Mr Mondal sold Moti Mahal Indian restaurant. A copy of a lease was supplied which indicates a company called Montoora Holdings leased a property at 237 rocky point road Ramsgate in March 2014.
31. The applicant's representative had access to documents on the Department file. They pointed out that a file note at folio 171B states that a delegate from the Department had checked the photo of the applicant against the 'list of people checked' and that the applicant did not appear to have been included in the site visit list. The Tribunal accepts that if that was the case the evidence in relation to the site visit conducted on 23 March 2011 is not to be relied upon. The Tribunal accepts that the TRA assessment was dated on the next page and that last page was not provided to the Department with the application. The Tribunal places no weight on the TRA assessment date not being provided to the Department with the application or the site visit.
32. The applicant provided written evidence from Mr Mondal and his own evidence.
33. The applicant claims that he did volunteer work at Moti Mahal Indian restaurant from 2008 to 2009. At the hearing he stated that the restaurant had a supervisor and that the cook supervised him. He was not able to provide any evidence from those persons to support his claim of work experience at the restaurant.
34. The statements provided from Mr Mondal are inconsistent. Evidence given by Mr Mondal in a statutory declaration is not consistent with earlier statements. At an interview with the Department on 24 March 2011, as set out in decision record, Mr Mondal stated that he sold the business in February 2010 and had full involvement as the restaurant manager up to that time. He stated he kept no records of his volunteer workers. He stated that there were 7 people working in the kitchen. At hearing the applicant stated that Mr Mondal had supervisors and managers at his restaurants as he was so busy. He stated that the chef kept records of volunteers and that there were 4 to 5 people in the kitchen.
35. In a response, from the applicant, dated 7 September 2015 to a natural justice letter from the Department he provided a statement from Mr Mondal in which he stated he operated the business at 195 Rocky Point Road Ramsgate from 2001 to September 2014 after which he relocated his business to 237 Rocky Point Road Ramsgate.
36. In documents provided by the applicant which purport to be from Mr Mondal's solicitors there is a sale of business and lease document which indicates Mr Mondal purchased the business in 2005.
37. In a statutory declaration dated 6 September 2016 provided in response to a further natural justice letter Mr Mondal stated that he still owned the business. He stated he owned it since 2001 to September 2014 after which he relocated to a new address as outlined above.
38. He claims that when he was asked to identify photos during his interview he identified the applicant. He confirmed he had spoken to the Department at the Department's offices. In previous statements he had insisted that there was no visit by Department officials on 24 March 2011 to the restaurant and that no one at his restaurant had spoken to the Department.

39. The Tribunal is of the opinion that Mr Mondal is being disingenuous in relation to his claims of no-one from his restaurant spoke to the Department or visiting his restaurant on 24 March 2011. The Tribunal from the evidence before it is satisfied that the Department did conduct a site visit on 23 March 2011 and spoke to someone who identified themselves as an owner. They were shown photos of a number of other applicants. The Tribunal accepts that the applicant was not included in that list. Mr Mondal then presented himself the next day to the Department.
40. The Tribunal after considering all Mr Mondal's evidence and the inconsistencies is not satisfied that his evidence can be relied upon as evidence that the applicant completed the required hours of work experience at his restaurant.
41. He claims to have owned and run the restaurant in 2001 when the legal documents provided by the applicant indicate he purchased it in 2005.
42. He may have been the owner of the restaurant from 2008 to 2009. His evidence is that he is very busy however he was involved in the management and knew the applicant well. If that is the case here is no explanation as to why he did not identify the applicant as one of his employees when he was interviewed at the Department on 24 March 2011. He later claims that he did identify the applicant. The Tribunal is not convinced that the Department had any benefit to gain from incorrectly reporting that he could not identify the applicant. The Tribunal does not accept that Mr Mondal did identify the applicant. The Tribunal prefers the evidence of the Department in that regard.
43. Mr Mondal's evidence as presented to the Tribunal by the documents supplied by the applicant is inconsistent and unpersuasive. The Tribunal does not accept his evidence as accurate.
44. The applicant's evidence was equally vague in relation to any other evidence he may have had. He was unable to clearly identify the year when he stopped working as a cook. He named some restaurants however was not able to provide any references, payslips or detail to how long he worked there.
45. If the Tribunal accepts that Mr Mondal was involved in the running and management of the restaurant on a daily level then it finds that Mr Mondal should have a clear recollection of the applicant. His response that he is very busy is not sufficient to explain why he could not at interview identify the applicant or why his various statements were so inconsistent.
46. The Tribunal does not accept that Mr Mondal is a reliable and accurate source of information in regards to the applicants work experience. His evidence is misleading, the Tribunal does not accept that he had sufficient knowledge of the applicant to properly verify in writing work experience which was undertaken and which the Trades Recognition Australia assessment relied upon.
47. Therefore, the applicant does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) BE WAIVED?

48. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

49. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
50. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
51. The Tribunal accepts that the applicant is currently working as a forklift driver. The bank statements provided to the Tribunal show that some money is being deposited into a joint account which he operates with his wife. The Tribunal does not accept that his working is a compelling circumstance which affects the interests of Australia. There is no other evidence before the Tribunal to indicate that there are any compelling circumstances that affect the interests of Australia.
52. At hearing and in written submissions the applicant stated that he was supporting his wife and child. He stated he had been in Australia almost 9 years. His daughter was born in Australia in 2015. He stated that he wife has started studying and she would like to continue her studies. He stressed that he was their financial supporter.
53. The family might suffer financially if the applicant was to return to Bangladesh however he has family there and originally came here on a student visa. The Tribunal is satisfied that with the skills he has obtained and the support of his family he would be able to continue to support his family.
54. The Tribunal accepts that an adverse finding against the applicant could mean that his wife will not be able to continue her studies and they could suffer financially however there is nothing before the Tribunal to indicate that the applicant's wife or child are Australian permanent residents or citizens or eligible New Zealand citizens.
55. Therefore the requirements of cl.4020(1) should not be waived.
56. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.886.225.

DECISION

57. The Tribunal affirms the decision not to grant the applicants Skilled (Residence) (Class VB) visas.

Catherine Carney-Orsborn
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...